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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED,

Petitioner,

vs.

JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY, AND BALTIMORE & OHIO RAILROAD CO.;

JOHN M. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER

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I

The Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 62a) was rendered on July 30th, 1945, and is reported in 4 F. R. D. 479.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, was rendered on December 10th, 1945 and is reported in 153 F. (2d) 212.

II.

Jurisdiction

(1) The Court of Appeals for the Third Circuit entered judgment herein, reversing the judgment of the District Court on December 10th, 1945.

(2) This suit was predicated upon the maritime law, as modified by the Act of Congress known as the Merchant Marine Act, March 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. A. 688.

(3) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347 (a).

(4) The order holding respondent in contempt was a final judgment and when that order was brought before the Court of Appeals, the Court acquired jurisdiction to review all phases of the case involving the merits as well as the order of contempt. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 66 L. Ed. 848.

(5) The jurisdiction is not qualified either as to subject matter or as to the nature of the decision of the Circuit Court of Appeals. Robertson and Kirkham, Sec. 114, P. 199.

(6) The Supreme Court should exercise its jurisdiction to review such a case of extraordinary and exceptional circumstances. *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 60 L. Ed. 715; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518,

41 L. Ed. 810; *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, 79 L. Ed. 439.

(7) Certiorari has been held to be appropriate to review an interlocutory decree of a Circuit Court of Appeals where the question of law involved was deemed to be "novel and important" and the position of the petitioner was one which, if correct, rendered the decision of the Court below, wholly void. *American Construction Company* v. *Jacksonville T. & K. W. Railway Company*, 148 U. S. 372, 37 L. Ed. 486. See also *Spiller* v. *Atchison, T. & S. F. Railway Company*, 253 U. S. 117, 64 L. Ed. 810; *George A. Fuller Company* v. *Otis Elevator Company*, 245 U. S. 489, 62 L. Ed. 422; *United States* v. *Gulf Refining Company*, 268 U. S. 542, 69 L. Ed. 1082.

III

Statement of the Case

This is a suit by the personal representative of a deceased seaman to recover damages for alleged wrongful death.

The decedent had been in the employ of the respondents Taylor and Anderson, as a member of the crew of respondent's Steamtug "J. M. Taylor." On February 6th, 1943, the tug was engaged in towing a car float of the Baltimore & Ohio Railroad across the Delaware River and in the course of the towing operation, the float became stuck in the bed of the river. It was decided to wait until the following morning before attempting to extricate the float and, in the meantime, the tug was anchored to the float. During the night the float came to the surface beneath the tug and caused it to capsize and sink with the loss of five lives. The decedent was one of those lost.

This action was instituted on November 26th, 1943, in behalf of the next of kin of the dececent and thereafter plaintiff filed a series of interrogatories which, among other

things, calls for a list of all persons who had made oral and written statements and for a copy of each such statement. Objections to the interrogatories were filed by respondents, which, after argument, were overruled. In answering the interrogatories, respondents stated that their counsel, Mr. Fortenbaugh, had taken the statements of the four survivors of the tug and had interviewed divers other persons, but declined to disclose the identity of the persons making any oral or written statements, other than the four survivors. The respondents also declined to produce either the statements of the four survivors or any other statements, except for a copy of the survey of the damage to the tug. Plaintiff thereupon moved for an order directing the respondents to disclose the identity of the remaining statements and records and to produce all written statements and memoranda of oral statements. Counsel for the respondents then submitted a typewritten statement and subsequently gave testimony for the purpose of the record showing how and for what purposes the statements were obtained. It appears from Mr. Fortenbaugh's statement and testimony that the investigation of the case was delegated to Mr. Fortenbaugh, as counsel, not only for the respondents Taylor and Anderson, but also for their underwriters (R. 59a). It was alleged further that Taylor and Anderson did not maintain any claims department of their own, but it was admitted that the underwriters did maintain their own claims department and investigation staff (R. 59a). Upon these facts the case was set down for argument. Because of the importance of the issue involved and because the District Judges recognized the necessity for a uniform rule to control all similar matters, all five of the District Judges sat as the Court *en banc*. The argument was participated in not only by counsel involved in the instant case, but the Court allowed the appearance as *amicus*

curiae of counsel for the railroads, steamship companies and insurance companies, all of whom argued in support of respondents' position.

The District Court, in an opinion by Judge Kirkpatrick, concurred in by the four remaining judges, granted petitioner's motion and held that respondents must produce all the statements and memoranda called for. The Court declined to extend the doctrine of "privilege" to cover statements obtained by counsel from third persons, while acting in the role of an investigator. The District Court accordingly entered an order directing respondents to disclose all the relevant documents.

A statement was thereupon filed with the Court signed by respondents Taylor and Anderson and by their counsel, Mr. Fortenbaugh, in which all three "decline to obey the order of Court" (R. 68a). The District Court then entered its order holding all three respondents in contempt of court and the appeal to the Circuit Court of Appeals followed.

The Court of Appeals reversed the District Court's order of contempt, upon the ground that all statements and memoranda procured by a lawyer were the so-called "work product" of the lawyer and therefore privileged from disclosure. In arriving at this conclusion, the Court enlarged the scope of the doctrine of "privilege" beyond the interpretation theretofore given to that doctrine under American jurisprudence.

IV

Specifications of Error

The Circuit Court of Appeals erred in the following respects:

First. In failing to follow the general rule of "privilege" which is limited to communications between counsel and client.

Second. In construing the term "privilege" as used in the Civil Rules to include communications and conversations between counsel and third parties having no relationship to the client.

Third. In characterizing statements taken from and conversations conducted with third parties as the so-called "work product" of a lawyer.

Fourth. In holding that the so-called "work product" of a lawyer includes statements and facts obtained from third parties, and that such statements and facts are "privileged" and exempt from the discovery provisions of the Rules of Civil Procedure.

Fifth. In holding that strict compliance with discovery provisions will result in a divided allegiance on the part of counsel in violation of the canons of ethics.

ARGUMENT

Summary of Argument

Petitioner contends that the discovery provisions of the Civil Rules should be construed to mean exactly what they say. Rules 26 to 34 provide that any party may be required to disclose *all* the facts within his knowledge or control, subject only to *two* exceptions; first, that those facts be *relevant*, and second, that they be not *privileged*. It is the latter exception which is the core of the controversy here. Petitioner contends that the term "privilege", as it is used in the Rules, should be limited to communications between counsel and client and no further. This is in accordance with the interpretation which has been placed on that term since time immemorial in American Jurisprudence. The District Court so held and directed the respondents to disclose the data which counsel for the respondents had learned from third parties. In reversing the District Court, the

Court of Appeals reached the conclusion that all facts obtained by the lawyer, including information secured from *third parties*, should be exempt from disclosure. The Court of Appeals, however, recognized that such an exemption could not be justified under the generally accepted interpretation of "privilege", so it enlarged the scope of that term to include the so-called "work product" of the lawyer. The Court then committed what we consider to be further error by including within the so-called "work product" of the lawyer all the factual information or data which is obtained by the lawyer.

It is petitioner's contention that the Court of Appeals, by enlarging the exemption on the ground of privilege thereby abrogated the express purpose of the Rules and in effect made impotent those discovery provisions which were intended to benefit a most substantial segment of the people. The exemption from disclosure was intended by the draftsmen to be restricted to its narrowest limits thereby requiring the disclosure of all possible facts and data, and thus eliminating the "sporting theory" of justice. The decision of the Court of Appeals would defeat that purpose and on the contrary, would leave one type of litigant such as a corporation or insurance company with a tremendous advantage over the individual litigant. The former can plead that all or most of the material information pertaining to the litigation was developed by their counsel and is, therefore, privileged. The latter, being an individual and necessarily having direct knowledge of the matter in controversy, could be compelled to disclose all intimate details, either by oral examination under Rule 26(b), or by the interrogatories under Rule 33. Thus, the corporation could ascertain all of the opponent's case without having to reveal its own data, simply because it was gathered by its counsel instead of its own employees or investigators.

Having brought the lawyer's "work product" into the exemption of privilege, the Court of Appeals then placed an extraordinary interpretation upon that so-called "work product" so as to include not only the lawyer's theories, opinions, conclusions and other mental processes, but also all those facts and data procured by the lawyer or under his direction. It is petitioner's position that the facts in any case are always fixed and there is nothing that the lawyer can do which can have the effect of changing those facts. Those facts cannot therefore be considered in any degree as the "work product" of a lawyer.

Petitioner makes the following contentions:

(1) The purpose of the discovery provisions of the Federal Rules is to eliminate the element of chance from litigation and assure a determination of each controversy on the merits.

(2) The scope of discovery under the Federal Rules permits the widest latitude in ascertaining before trial the relevant facts concerning the real issues in dispute, subject only to the limitation of privilege.

(3) The limits of privileged matters exempt from discovery include only communications between counsel and client and does not extend to matters between counsel and third parties.

First Point

The purpose of the discovery provisions of the Federal Rules is to eliminate the element of chance from litigation and assure a determination of each controversy on the merits.

Before the adoption of the Federal Rules of Civil Procedure, neither party to a litigation could discover any data in the possession or knowledge of the other. Except where a document was made in the regular course of an opponent's business, a party could not ascertain from any

other party what evidence or facts were available relative to the issues at hand. The technical rules of practice protected a wrong-doer in many instances because the disclosure of facts which were in his possession could not be compelled, with a resulting miscarriage of justice. Under the old law also, the trial of a law suit very frequently developed into a battle of wits between counsel, each party attempting to keep the other in the dark as much as possible. The Federal Rules of Civil Procedure, *inter alia*, were intended to overcome and eliminate exactly that situation. The Rules were designed to take the so-called "sporting theory of justice" out of the trial of a law suit and to reduce to a minimum or wipe out entirely the element of surprise by making available to all parties all facts which had any relevancy to the proceedings regardless of whether those facts or documents be within the knowledge or custody of an opposing party or third party.

The discovery provisions of the new Rules were intended to afford to all of the parties an opportunity of utilizing all the relevant material wherever it might be located. The purpose of the discovery provisions of the Federal Rules was stated in *Mackerer* v. *New York Central Ry. Co.*, 1 F. R. D. 408, where the Court, quoting with approval from an article by Justice Holtzoff, said:

> "The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice,' to provide efficient machinery for the ascertainment of truth; and to expedite a determination of each controversy on the merits."

Some Courts found it difficult to follow the clear mandate of the Rules requiring disclosure and seized upon collateral considerations to defeat the very purpose of the

Rules, as in *McCarthy* v. *Palmer*, 29 F. Supp. 585, where the Court very narrowly construed the discovery provisions because they "would penalize the diligent and place a premium on laziness." This position, of course, completely defeats the express purpose of the Rules which seek to develop the true facts, and it should not matter whether counsel be lazy or diligent or that one be more resourceful than the other. The most important consideration beyond all others is that the true facts should be presented to the Court and no collateral incidents should be permitted to nullify or impair that objective. The *McCarthy* case was severely criticized and disapproved in *Seligson* v. *Camp Westover, Inc.*, 1 F. R. D. 733, where the Court went so far as to permit an examination of the defendant's insurance carrier before trial. In this connection, the Court said:

> "The Court realizes that in most instances the insurance company is the real party in interest and not the assured. It has been held that permitting such an examination 'would penalize the diligent and place a premium on laziness.' McCarthy *v.* Palmer, D. C. 29 F. Supp. 585, 586. Assuming that this necessarily follows, it must be kept in mind that the new Rules of Civil Procedure are fashioned to eliminate the old concept of litigation as a battle of wits and to provide the tools whereby the facts from which the truth may be more easily ascertained and substantial justice done. *To the extent that this search for the truth infringes on the convenience of litigants, such convenience must yield to that extent.*"

It is fair to state, therefore, that the Federal Rules were intended to enable the parties to discover the true facts and compel their disclosure wherever they might be found. The purpose of the Rules as otherwise expressed is to assure that the litigation will be conducted "with all the cards on the table."

SECOND POINT

The scope of discovery under the Federal Rules permits the widest latitude in ascertaining before trial the relevant facts concerning the real issues in dispute, subject only to the limitation of privilege.

The provisions relating to discovery are found in Rules 26 to 37 of the Federal Rules of Civil Procedure. The particular Rules which are involved in this argument are 26, 33 and 34. Rule 26(a) provides that the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition, upon oral examination or written interrogatories, for the purpose of discovery or for use as evidence in the action or for both purposes. Rule 33 provides for interrogatories directed against the parties themselves, and Rule 34 covers the dicovery and production of documents and things for inspection, copying or photographing. The scope of examination under these Rules is defined in Rule 26(b) which provides specifically that the deponent may be examined regarding *any relevant matter which is not privileged.* This scope has been held to be applicable to all three of the aforementioned Rules. The scope of the discovery provisions of these Rules is considered in an extremely able article by Justice Holtzoff in 41 Mich. Law. Rev. 205, where the author summarizes the weight of authority as follows:

> "From the very inception, the principle was enunciated by the Courts that the scope of examination on interrogatories is co-extensive with that permitted under the rules relating to depositions. *Specifically, interrogatories need not be confined to securing evidence that would be admissible at the trial, but may include inquiries for the purpose of eliciting information leading to the procurement of such evidence.* They need not be limited to ultimate facts, but may extend to

detailed items of evidence.' *That the proceeding may constitute a 'fishing expedition' is not a valid objection to interrogatories.* As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them. A liberal attitude on this point will promote the ends of justice." (Italics ours)

The same general rule was laid down and followed in *Nichols* v. *Sanborn Company*, 24 Fed. Supp. 908, as follows:

(p. 910) "It is perfectly apparent that Rules 26 to 37 inclusive, of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c relating to depositions, discovery, depositions on oral examinations and written interrogatories, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and the admission of facts and genuineness of documents were formulated *with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute*, and permitting interrogatories to parties in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided at the trial and eliminate all expense and difficulty that would be involved in their production at the trial. They were formulated with a view to simplifying the issues . . .

"In this connection it is well to note that Rule 26 (b), 28 U. S. C. A. following section 723c, dealing with the scope of examination in depositions permits examination 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.'"

"The restrictions which hampered Equity Rule 58 are not applicable to discovery under Federal Rule 33; it should be noted that Rule 33 does not expressly define the scope of discovery permitted under it. Since there is an unlimited right to discovery by taking depositions upon oral examination or upon written interrogatories, the silence of Rule 33 on this matter must be construed to permit discovery of the same scope."

See also:

Heublein v. *Bushmill*, 2 F. R. D. 190 (D. C. Pa.);
American etc. Corp. v. *American Oil Co.*, 25 F. S. 386;
Loughran v. *Zimmelman*, 28 F. S. 348;
Brewster v. *Technicolor Inc.*, 2 F. R. D. 186;
Schoeneman v. *Brauer*, 1 F. R. D. 292;
American Lecithin Co. v. *Cleary Corp.*, 1 F. R. D. 603;
Pirnie v. *Andrews*, 1 F. R. D. 253;
Mackerer v. *N. Y. Cent. R. Co.*, 1 F. R. D. 408.

It will be recalled that the only two conditions imposed on the right of discovery are that the matters sought must be relevant and not privileged. The term "relevancy" as used in the Rules means in substance and effect *relevancy to the proceedings and not relevancy to the ultimate facts in issue.* The distinction between a search for evidentiary facts and an inquiry into ultimate facts has been abolished. *Schoeneman* v. *Brauer*, 1 F. R. D. 292. Similarly, objections to motions for discovery based upon admissibility, competency and materiality furnish no basis for denying the right to discovery; *Houghton Mifflin Co.* v. *Stackpole*, 1 F. R. D. 506; *Pirnie* v. *Andrews*, 1 F. R. D. 253; *Byers Theatres* v. *Murphy*, 1 F. R. D. 286; *Brewster* v. *Technicolor Inc.*, 2 F. R. D. 186; *DeSeversky* v. *Republic Av. Corp.*, 2 F. R. D. 183.

An excellent analysis of the Rule is set forth in *Lewis*

v. *United Airlines Transport Corp.*, 27 Fed. Supp. 946, wherein the Court said:

> ". . . That the examination may develop useful information by way of discovery which may not be admissible or material upon the precise issue is aside from the point; to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible."

It is clear beyond doubt that the scope of the discovery provisions is sufficiently broad to compel disclosure of all relevant matters and to assure trial on the merits. The Court below was in complete accord with that general rule, but because of the "impact" on the lawyer-client relationship, the Court below extended the "privilege" so as to exempt from disclosure those statements procured by the lawyer. An analysis of the term "privilege" and its origin convinces that the Court below fell into error on this point.

THIRD POINT

The limits of privileged matters which are exempt from discovery include only communications between counsel and client and do not extend to matters between counsel and third parties.

It is no longer open to dispute that every party has an unlimited right to discovery of all relevant material in the possession of every other party with the sole exception made for privileged matters. In outlining the rule and the exception, Justice Holtzoff, in 41 Mich. Law Rev. 205, stated:

> "The elimination of the 'sporting theory' of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great ob-

jectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery, by which a disclosure may be obtained in respect to all pertinent information in the possession of any party to a litigation. An exception is, of course, made for privileged matter. *It is one of the basic theories of the new procedure that every party to a law suit is under a duty to reveal to any other party all pertinent data in his control, with the sole exception just mentioned.* Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules." (Italics supplied.)

It is obvious that the draftsman of the Rules intended to give the discovery provision as broad an application as possible and in order to effectuate that purpose, the Rules must be read in a light which restricts the exception of privilege to its narrowest bounds. It is fair to suggest that if it were intended to broaden or extend the privilege beyond its usual and legally recognized meaning, then the draftsman would unquestionably have inserted an appropriate provision into the Rules themselves. It will be seen that in certain special instances, legislation has been passed to extend privilege to additional material not ordinarily within the Rule. It follows that if the draftsmen of the Civil Rules intended to enlarge the "privilege", they would likewise have so expressed that intention in fitting terms. In the absence of any such extension attached to the Rules, we submit that the privilege referred to in the Rules must be construed in its customarily accepted legal meaning, and if there must be a change, then the boundaries of "privilege" should be narrowed rather than enlarged, in order to give effect to the liberal provisions of the Rules.

A brief review of the nature and origin of privilege may be helpful in the consideration of the problem at hand. In Cyclopedic Law Dictionary, Third Edition, P. 877, privi-

lege was recognized as being associated under the following circumstances:

> "In Evidence, Communications which the law refuses, on grounds of public policy, to allow to be disclosed in evidence. The policy prohibiting such disclosure may be (1) political, as that restraining the disclosure of secrets of state, (2) judicial, as that which prohibits the disclosure of proceedings in the jury room, (3) professional, as that which forbids the disclosure of statements by client to attorney, or (4) social, as that which restricts the disclosure of communications between husband and wife."

It will be noted that so far as attorneys are concerned, the Rule is limited to attorney and client, and there is no implication that it applies between attorneys and third parties. This will become more evident from further analysis.

One of the most able discussions of privileged material is set out in Wigmore on Evidence (3rd Ed.); Section 2290 develops the origin of the term as follows:

> "History of the Privilege. The history of this privilege goes back to the reign of Elizabeth, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (ante § 1364) and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (ante § 2190) it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commanded itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion."

The theory behind the Rule originally differed from that which is the basis of privilege in the present day. Originally: (Vol. VIII, p. 547)

"But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one,—a consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client. How significant the 'point of honor' was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (ante, § 2286). Clearly, the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.' If the 'point of honor' was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

"That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (ante, § 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law.

"Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser (post, § 2291). It proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law."

The policy of the privilege is stated in Section 2291, p. 550:

> "The policy of the privilege has been plainly grounded since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory. In short, all four of the elements already noted (ante, § 2285) as essential to such a privilege are here deemed to exist."

The four elements referred to above in Section 2285 are as follows:

> "(1) The communications must originate in a confidence that they will not be disclosed;
>
> "(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> "(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
>
> "(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

In considering certain extensions of privileges accomplished by means of legislation, Wigmore takes occasion to point out that those tendencies are unwholesome and should be restricted rather than enlarged: (Vol. VIII, p. 539)

> "Novel Privileges. Of recent years, there have appeared on the statute book of several Legislatures certain novel privileges of secrecy. Their history has not been traced; but they bear the marks of having been enacted at the instances of certain occupational organizations of semi-national scope. The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it

some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.

> "'The analogies are not convincing (though this is not the place for a demonstration). Moreover, the tendency is an unwholesome one. Yet it threatens to spread not only to other Legislatures but to other occupations. *The correct tendency would rather be to cut down the scope of the existing privileges, instead of to create any new ones.*'" (Italics supplied)

After considering at some length the effect of the Rule on the development of the truth, Wigmore goes on to say: (Section 2291, p. 557)

> "Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. Even the answers to Bentham's argument concede that it is accurate and well-founded in its application to a certain proportion of cases. It is worth preserving for the sake of a general policy; *but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.*" (Italics supplied)

The general principles and statutory definitions which control the privilege as between attorney and client is set forth in Section 2292 as follows:

> "General Principle; Statutory Definitions. The phrasing of the general principle, so as to represent all its essentials, but only essentials, and to group them in natural sequence, is a matter of some difficulty. The following form seems to accomplish this:
>
> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure

by himself or by the legal adviser (8) except the protection be waived."

It is significant to note that in all of the definitions and rules which deal with "privilege", the bounds never go beyond the client-attorney relationship, and even with respect to that relationship, not every communication and matter is protected. No inference can be drawn from any of those rules or definitions which can conceivably cover any communication or matter between attorney and third party. In fact the basis of the Rule itself repudiates any such suggestion.

Wigmore significantly points out that "privilege" is not applicable to knowledge acquired by the attorney from third persons and the following excerpt is peculiarly applicable as follows: (Section 2317, p. 615-616)

> "1. The privilege is designed to secure subjective freedom of mind for the client in seeking legal advice (ante, §2291). It has no concern with other persons' freedom of mind, nor with the attorney's own desire for secrecy in his conduct of a client's case. *It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particuler third person for the benefit of the client.*" (Italics supplied)

The same general rule is expressed in *Ruling Case Law*, Vol. 28, Sec. 143, page 553, as follows:

> "The testimony of a witness as to conversations with a party to an action cannot be excluded merely on the ground that the witness is an attorney at law, and that the communication was confidential, unless it also appears that he was the attorney for the party, and that the communications were made in the course of such professional employment. In other words, to exclude declarations as communications to counsel,

or made with a view to employment, *their root in the relation, or contemplated relation, of client and attorney must be manifest.* They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it." (Italics supplied)

The Rule relating to privilege, particularly as it affects the right to discovery, is analyzed in *American Jurisprudence*, Volume 17, Sec. 28, page 21, as follows:

"Communications to an attorney are not privileged from discovery where the confidence is given before the relationship of attorney and client is formed or after it has ceased, *or where the information is acquired by the attorney from persons other than his client, although such information is obtained while the attorney is acting as counsel.* Generally speaking, an attorney may be compelled to produce books and papers which do not constitute confidential communications and which are not received by him for the purpose of consultation, as where they are placed with him for mere safekeeping. *The test generally applied is whether the client is bound to produce the papers. An attorney can be compelled to produce in evidence any paper or record in his possession belonging to his client which the client himself could be compelled to produce.*" (Italics supplied)

To recapitulate, the exemption from disclosure upon the ground of privilege has long been recognized in the law but because it is, as Wigmore points out, "an obstacle to the investigation of the truth", the exemption is limited to the narrowest possible bounds and before any claim of privilege can be allowed, it must necessarily be shown that the information or communication in question was made in confidence to the professional legal adviser pursuant to the relationship of lawyer and client. Thus, by its very terms, as well as because of the reason for the very exist-

ence of the rule no information or communication obtained from a *third* party can possibly be exempt as privileged.

The Court of Appeals recognized that statements procured by a lawyer from third parties cannot ordinarily be exempt from disclosure under the generally accepted legal concept of the doctrine of privilege. However, the Court felt compelled to depart from the general and long established rule because of "the impact of the discovery provisions of the rules on the lawyer-client relation." It is suggested by the Court below that if counsel were required to make disclosure of a statement which he had obtained from a third party, and if thereafter that third party was called as a witness and gave testimony on the stand different than that which he stated to the lawyer, the lawyer could then be called to contradict that witness at the instance of the opposing counsel. The Court below felt that under these circumstances the lawyer would be testifying against his own client and in effect, would be violating the canons of ethics. Solely because of this consideration did the Court below feel obliged to create a most substantial extension to the general rule of privilege. We respectfully submit that the conclusions of the Court below cannot stand analysis, and in enlarging the rule, the Court completely destroyed the very basis for the rule itself.

It is pertinent first to consider the so-called "impact on the lawyer-client relationship." There would be no quarrel if the facts in question were known to or learned by the party himself either by his own investigation or through a lay investigator. Under these circumstances, it is conceded by all concerned that the information would not be privileged. Nor could it be seriously disputed that the party himself could be required to testify under oral examination concerning all of these facts which he learned directly or through a lay agent. In so doing, that party is in effect

testifying against himself, and this is precisely what the Rules of Discovery were intended to accomplish in order that all parties should have as complete access as possible to all the facts in the investigation of the truth. If, however, the investigation is made by the lawyer rather than by an investigator and the lawyer is then called upon to make disclosure of the facts, he is not being called upon to do more than that which is required of his client. In this connection, we submit that when a lawyer personally engages in the investigation of the facts from third persons, his position is no different than that of any ordinary investigator and the fruits of that investigation should not be regarded any differently. It is an accepted doctrine that where a client loses his "privilege" as by waiver, the lawyer cannot claim it. Similarly where the client has no privilege as by operation of law, none can exist in favor of the lawyer. The suggestion that there is an unjust impact upon the lawyer-client relationship from the lawyer's disclosure of those facts is thus a fallacious premise since the lawyer does no more than that which the client must do under the rules.

Referring to the ethical problem involved, we earnestly suggest that the Court again overlooked the basic problems involved. If this were a situation where counsel voluntarily took the stand to deliberately testify against his own client, there might be some question of ethics involved. Here, the lawyer does not take the stand voluntarily, nor does he intend to testify *against* his client. On the contrary, his disclosures are by compulsion, and under no circumstances can he be accused of any dereliction or lack of zealousness in his client's behalf. In the past, lawyers have been called by their adversaries to contradict something that a witness had testified to under oath and that practice could never be successfully opposed upon the ground of privilege. In this respect, therefore, the Rules of Discovery have not made

any change in the law, but may possibly increase the number of occasions when a lawyer may be so called to repudiate a perjuring witness. In this connection, it must also always be borne in mind that the trial Court may exercise its discretion in controlling the situation as it has in the past. We respectfully submit that there is not the slightest suggestion of any violation of the rules of ethics in connection with this practice. If the point should be decided from the standpoint of ethics, we think that legal ethics would require the lawyer as an officer of the Court to repudiate the testimony of any witness who had perjured himself. We have never understood legal ethics to justify any lawyer in standing mute when of his own knowledge he knows that a witness has perjured himself. From any viewpoint, we submit that the conclusions of the Court below were erroneous and from the standpoint of privilege, we do not see how the extension created by the lower Court can possibly fit into or have any place in that category.

Having created an extension to the doctrine of privilege, the Court appreciated that it was inviting trouble and would completely emasculate the discovery provisions of the Civil Rules unless some limitation could be imposed upon the new extension. The Court finally adopted with some misgivings the so-called "work product" of the lawyer in definition of the extension. Here again, the Court completely misconceived the functions of the lawyer. If we accept the phrase "work product" in its ordinary meaning, it could only be construed to imply that which the lawyer has himself created such as his theories, his opinions, his conclusions and inferences from facts or law. These are truly the "work product" of a lawyer. On the other hand, no amount of ingenuity or skill on the part of a lawyer can alter or change in the slightest degree the true facts in any case. The fact that the lawyer merely has uncovered certain facts

does not even remotely give rise to the suggestion that those facts are his "product." While the lawyer may draw the most ingenious inferences from the facts, yet there is nothing that he can do which will change in any way the facts.

The unsoundness of the Circuit Court's holding in this respect becomes more evident when the theory upon which the holding is based is taken another step toward its logical conclusion. In *Shields* v. *Sobelman*, 9 F. R. S. 26 b. 211, (case 5) the plaintiff sought the production of pictures which had been taken of the scene of the accident immediately after the occurrence. The defense was raised that the pictures were taken under the supervision of the lawyer and that they were therefore privileged. Although the District Judge ordered these particular pictures produced, he nevertheless acknowledged that, under the rule laid down by the Court of Appeals in the *Hickman* case, the claim of privilege could apply equally to pictures as well as to statements, as follows:

> "The question presented is not free from doubt. I cannot see very much distinction between a statement of a witness taken by a lawyer and a photograph taken, to all intents and purposes, also by a lawyer. Of course, the lawyer does not actually press the release of the camera that takes the picture, and does not develop the photographs; but they are made as he directs and they are evidence in the case, exactly as the statement of a witness is in evidence in the case, and into them both go some of his legal knowledge as to what is relevant and what is not, and what is evidence it behooves his client to be prepared to present."

By a similar process of reasoning, anything that the lawyer comes into contact with is as if touched by a magic wand and automatically becomes privileged from disclosure to any other person or party. We submit that this is a

wholly erroneous view of the "work product" of a lawyer. The lawyer cannot apply his mental processes to mould the facts in the light most favorable to his client. On the contrary, the canons of ethics require him to accept the facts as they are and present his client's case without altering those facts to suit his client's convenience or wishes. The lawyer is free to exercise his mental processes and his reasoning to the fullest extent, in the interpretation of facts and the law as applied thereto, but not to change or alter those facts. He cannot create the facts or bring them into being. The facts are already there when the lawyer enters the picture. The facts, therefore, cannot be said to be the product of the lawyer. We submit, therefore, that the Court of Appeals committed error in holding that the facts elicited from witnesses constituted a part of the "work product" of the lawyer.

The adoption of the Rules of Civil Procedure came as a rude jolt, as the Court below stated, to the practicing lawyer and to some Courts. Although the language of the Civil Rules is unambiguous and clear, yet some District Courts simply refuse to believe that the rules were intended to go as far as the plain meaning of the language used required. On the whole, however, after the Rules had been in operation for a short while, the general tendency of the Courts was to place a liberal rather than a restrictive construction upon the rules. In the District Court below, before the decision in the instant case, the several Judges were of varying opinions concerning the interpretation of the rules, and it was because of the lack of unanimity and because of the importance of the question involved that the District Court decided to sit *en banc* in order to fix a uniform rule. Because the principle involved governed practically all of the litigation before the Court, the bar was invited to attend and participate in the question in the instant case. It

was only after full hearing was accorded not only to the instant parties, but to all who desired to be heard that the District Court rendered its decision and held that statements procured by a lawyer from third parties could not be exempt from disclosure upon the ground of privilege. In this connection, the Court made the very pertinent observation:

> "The question of privileged communications between attorney and client is another matter and is governed by rules of law. Of course, the Court may not, in exercising its discretion, transgress those rules. *However, the mere fact that statements of third parties have been taken by an attorney does not of itself give rise to the privilege. In such case the lawyer is merely the medium through which his client becomes apprised of facts and his intention to transmit them to his client does not make the facts privileged from disclosure in answer to interrogatories.* We think that none of the statements made by witnesses in the present cases are protected by any rule relating to privileged communications between attorney and client." (Italics supplied.)

In other jurisdictions, similar reasoning was followed, as in *Seligson* v. *Camp Westover, Inc.*, 1 F. R. D. 733, where the plaintiff sought an examination of the defendant's insurance carrier before trial. The Court said:

> "Insurance companies occupy no different status from that of any other litigant. *To permit such a company in a negligence suit to evade examination on any theory other than privilege would amount to an emasculation of the liberal provisions of the new rules*, insofar as a plaintiff in such litigation is concerned. Nothing is shown in the moving papers from which this court could find that the matter sought to be obtained is privileged. *The mere fact that such information is in the hands of an insurance company or its attorney*

does not, in and of itself, make such information privileged." (Italics supplied.)

In *Colpak* v. *Hetterick et al.*, 40 Fed. Supp. 350, the defendant's insurance company, by its chief claim agent, was required to exhibit and furnish to the plaintiff's attorney certain copies of written statements made by the defendant and in the possession of the insurance carrier.

In *Price* v. *Levitt*, 1 Fed. Rules Service 350, the Court held that the plaintiff was entitled to take the deposition of the officers of the insurance carrier concerning written statements obtained by the company, and held further that those statements were not privileged, and could not be made so merely because they were turned over to counsel.

In *Lewis* v. *United Airlines Transport Corp., supra*, the Court held that only that information in the possession of counsel is privileged which represented a communication between counsel and client himself, and the privilege did not extend to reports made to the attorney by other persons.

In *Bough* v. *Lee*, 29 Fed. Supp. 498, it was held that the question of privilege could not be raised as between insurance company and attorney, nor could the attorney claim privilege for any document obtained by his own investigator.

In the matter of examination of the Citizens' Casualty Company of New York, 7 Fed. Rules Service 521, the Court pointed out that where the facts of statements elicited were otherwise relevant, the fact that they were taken and the investigation made by an attorney of the insurance company does not make the documents privileged. On the contrary, said the Court, "That information is not confidential, but is a legitimate source of inquiry."

The decision of the Court of Appeals below is in direct conflict with the decision in the case of *Hoffman* v. *Palmer*, 129 Fed. (2d) 976, affirmed 318 U. S. 109, decided by the

Second Circuit Court of Appeals. It is interesting to note that the Court below cited from the opinion in that case, and although a different conclusion was reached, no attempt was made to distinguish that decision. The facts in the *Hoffman* case are briefly these. One of the plaintiff's witnesses testified on cross-examination that before the trial he had given a written statement to the plaintiff's attorney. In the course of the trial, defendant's attorney asked for the production of the statement while the witness was under cross-examination. The Trial Judge refused to compel the production of the statement unless counsel would agree that it be admitted into evidence. Defendant's counsel refused to accept the condition imposed by the Trial Judge, and withdrew his request under protest and subsequently assigned the ruling of the Court as error when the jury returned a verdict in favor of the plaintiff. The Court of Appeals held that the Trial Judge should have permitted counsel to examine the statement as though its production had been requested under Rule 26. It will thus be seen that the question presented in that case was identical with the issue before the Court in the instant case. In reaching the opposite conclusion from that of the Court of Appeals at bar, the Court made this pertinent statement:

> "Some lawyers also grumble, saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. *But the reformers are surely right in replying that 'unfairness' to a diligent lawyer is of no importance as against much-needed improvement in judicial ascertainment of the 'facts' of cases; the public interest in such ascertainment is paramount.*"
>
> * * *
>
> "At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic

as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it, *The judge should have dealt with the request as if it had arisen under Federal Rules of Civil Procedure, rule 26 (b).*" (Italics supplied.)

We submit that the Court of Appeals in the instant case should similarly have subordinated the lawyer's convenience or embarrassment "to the judicial ascertainment of the facts" and considered that, "the public interest in such ascertainment is paramount". We think the same principle applies with peculiar force to the facts at bar. Whatever embarrassment may be entailed in those rare situations where the lawyer may be called to prove a statement which he himself took, is completely overshadowed in importance by the justice which will result from the ascertainment of the true facts, and the "benefit gained from the correct disposal of the litigation". (*Wigmore, supra.*)

Under the rules as presently framed, it is respectfully submitted that the Court below was in error in holding that the statements procured by counsel were exempt from disclosure. In this connection, it is appropriate to consider the proposed amendment of the Advisory Committee to Rule 30 (b) which would completely make impotent all of the discovery provisions of the Rules of Civil Procedure and which is a complete reversal of policy on the part of the Committee from its original intention to eliminate the sporting theory of justice from tthe trial of a lawsuit. The proposed amendment is as follows:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court is satisfied that denial of production or in-

spection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not orden the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert."

It will be noted at the outset from the proposed amendment that the Advisory Committee would close the door to the investigation of the truth even more tightly than does the decision of the Court of Appeals below. Under the new proposal, as soon as an investigation is undertaken, either during or in anticipation of a litigation, not only by counsel, but by any party or his insurance company, then the fruits of that investigation are immediately placed beyond the reach of the other party. The provision that the disclosure of the information may be compelled if the Court is satisfied that the denial of its production or inspection will unfairly prejudice the parties seeking the production or inspection is from the practical standpoint a most inadequate provision, as well as one which unquestionably will tend to create confusion and a complete lack of uniformity. To begin with, the entire object of the Rules of Discovery is to delve into the other party's knowledge in an effort to ascertain all of the true facts. Until a party knows what the facts are, it would be virtually impossible in most instances to show that there has been prejudice even though in most instances, there must actually be prejudice. Lack of knowledge of what the facts are, or particular evidence may be, precludes a showing of any such prejudice. As a practical matter it would be impossible to show prejudice under the circumstances. Thus the provision is a completely empty gesture by the framers of this proposal. The proposed

amendment follows along the lines of the decision in *Stark* v. *American Dredging Company*, 3 Fed. Rules Decisions 300, also decided by the United States District Court for the Eastern District of Pennsylvania. It was because that decision failed to work out a practical rule by which the Courts could uniformly apply Rules of Discovery that the District Court decided to sit *en banc* in this case and work out a new rule which would be in keeping with the spirit and the letter of the Federal Rules of Civil Procedure. It is significant to note that the very Court which rendered the *Stark* decision modified that decision to the extent set forth in the case at bar. In so doing, the Court set up a rule which would carry into effect the full intention of the draftsmen of the rules and which would result in complete uniformity of operation of the rules. That the decision of the District Court is a tremendous step forward in the development of the truth and in the interest of justice can hardly be seriously denied. The Advisory Committee would now have this Court go backward and change the rule to the point where a lawsuit is a battle of wits between counsel and the parties. In this respect, it is worthy of mention that at a symposium held during the Ninth Annual Judicial Conference of the Third Judicial Circuit on June 21st, 1946, this very point was debated before the bench and bar, and one of the chief participants, the former Senator George Wharton Pepper, Vice Chairman of the Advisory Committee on the Federal Rules, made what we consider to be a most shocking statement to the effect that the trial of a lawsuit is like a war and the parties should be left free to fight out their own battles, and, that the decision of the District Court was an "unrealistic" approach to the problem. We respectfully submit that the learned Vice Chairman is living in the far distant past and is completely unmindful of the problems which confront certain litigants, particularly

those not blessed with great wealth. While "might" is "right" on the battlefield, it has never been so considered in a court of law. Defendants, particularly corporate ones and insurance companies, have the facilities and funds necessary to make the most comprehensive investigations. On the other hand, impoverished parties, including those such as widows suing for wrongful death, and manual laborers suing for personal injuries, have neither the facilities nor the funds to conduct a comparable investigation, nor, as a rule, are the avenues of investigation open to the latter as are available to the former. For example, a member of a ship's crew or a railroad worker may become seriously injured, necessitating removal for medical attention. The man has neither the inclination nor the opportunity to conduct any investigation on his own behalf at the time when the witnesses are available and the recollections fresh. It may not be until a substantial period of time has elapsed and until after he has engaged the services of counsel that some inquiry may be made in his behalf. As a rule, by that time, the witnesses are no longer available, if ever they were, to the injured party. On the other hand, immediately upon the happening of an accident, the representatives of a shipowner or their underwriters set about obtaining statements of all of the available witnesses. In the trial of the case it may be assumed that the insurance companies will use only those witnesses who have rendered statements which may be used in opposition to the claim to the exclusion of those witnesses whose testimony may be favorable to the claimant. That this situation can and unquestionably has in the past resulted in miscarriages of justice in innumerable cases is not open to doubt. In death cases particularly, the proposed amendment would result in the greatest harm and injustice. In those situations, with the lips of the decedent sealed for-

ever, the widow and children of the deceased, being without personal knowledge of the occurrence, are very frequently without any information whatsoever concerning the manner in which the death occurred, let alone any of the more intimate details which might have caused it. We think it is safe to say that the inability to prove what actually occurred has in the past resulted in a verdict for the defendant in a tremendous number of cases solely because of a lack of proof and not because the defendant was not negligent or responsible for the death under the law. The learned Vice Chairman of the Advisory Committee asks this Court to go back to that rule and let these parties fight it out unhampered by any rules of Court. We suggest that the parties, on the one hand, the widow and children, and on the other hand, substantial insurance companies and other corporate defendants, are hardly on equal ground, and it was for reasons such as these that the Rules of Discovery were promulgated so that each party, great or small, would receive his just due. Thus equality and justice before the law becomes a reality and privilege and power only another vestigial remnant of jungle law.

It should be noted also that under the proposed amendment corporate defendants and insurance companies would have a tremendous advantage over individuals because under Rule 26 (b) the individuals could be interrogated concerning every matter which might have any possible relevancy to the issues at bar and could ascertain practically without exception the individual's entire case and therefore preclude the possibility of being surprised by any evidence at the time of trial. On the other hand, corporate defendants and others who seek to evade the effect of the Rules, can avoid disclosure of the facts, and at the time of trial, come into Court with a series of surprises without giving the adversary an opportunity to investigate the truth

or substance of any of that surprise evidence. Under the proposed amendment, therefore, there would result a tremendous advantage to corporate defendants and underwriters which, we are certain, was never contemplated by the draftsmen of the rules.

Conclusion

Upon the considerations herein set forth, it is respectfully submitted that the Court below erroneously enlarged the doctrine of privilege and completely misconstrued the true functions of the lawyer. As was stated by the Court of Appeals for the Second Circuit in the *Hoffman* v. *Palmer* case, in the judicial ascertainment of the facts, the public interest in such ascertainment is paramount, and as Wigmore stated, the doctrine of privilege is an obstacle to the investigation of the truth, and as such, it should be strictly confined within the narrowest possible limits consistent with the logic of its principle. Where third parties are concerned, the very heart of the principle involved in the doctrine of privilege would preclude its application to communications made by third parties. The decision of the Court of Appeals should, therefore, be reversed.

Respectfully submitted,

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